Supreme Court, U.S.
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In The Supreme Court Of The United States

October Term, 1994

DENNIS DELAYE,

Petitioner,

v.

AGRIPAC, INC., an
Oregon corporation,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. If an issue is not raised sufficiently for a trial court to rule on it, can a party raise that issue for the first time on appeal? If that is the rule in a circuit can an appellate Court ignore its own rule?

2. Where Congress intended that severance benefit plans be regulated under the Employee Retirement Income Security Act (ERISA), if an agreement provides for severance benefits in the event of termination, and those benefits are intended to be part of the inducement to become and remain employed, should Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987), be construed to require an ongoing administrative scheme beyond that presented in this case?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	10
1. This Case Presents An Exceptionally Important Question That Concerns The Essence Of Appellate Procedure.	10
a. The Dispositive Issue In The Ninth Circuit Was Raised For The First Time On Appeal . .	10
b. The Issue Argued In The Appellate Court By Respondent That The Contract Did Not Involve An "Ongoing Administrative Scheme" Was Not Raised Sufficiently For The Trial Court To Rule On It.	11
2. A Litigant Is Deprived Justice If The Appellate Court Allows An Issue To Be Raised For The First Time On Appeal.	15

TABLE OF CONTENTS - Continued

Page

3. The Contract Provisions In Question Were Part Of The Inducement To Petitioner To Become And Remain President, And They Contained Sufficient Administration To Constitute An ERISA Plan. 17

a. Fort Halifax Is Not Controlling For This Did Not Involve The Mere Creation Of A Benefit. . . . 17

b. Cases Stemming From Fort Halifax Are Distinguishable For This Plan Was Not A "Buyout Plan." 19

c. To The Extent An "Ongoing Administrative Scheme" Is Required To Constitute An ERISA Plan, The Required Showing Should Be Minimal. . 20

CONCLUSION 22

TABLE OF AUTHORITIES

Cases	Page
Angst v. Mack Trucks, Inc., 969 F.2d 1530 (3rd Cir. 1992) . .	20
Delaye v. Agripac, Inc., 39 F.3d 235 (9th Cir. 1994) . . .	2
Fontenot v. NL Industries, Inc., 953 F.2d 960 (5th Cir. 1992) . .	20
Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987)	i, 17
In Re E.R. Fegert, Inc., 887 F.2d 955 (9th Cir. 1989) . .	12
Moeller v. Bertrang, 801 F.Supp. 291 (D.S.D. 1992) . .	20
Morrow v. Greyhound Lines, Inc., 541 F.2d 713 (8th Cir. 1976) . .	14
Singleton v. Wulff, 428 U.S. 121, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976)	16, 17
State of Cal., Dept. of Health Services v. U.S. DHHS. 853 F.2d 634 (9th Cir. 1988) . .	16
Wells v. General Motors Corp., 881 F.2d 166 (5th Cir. 1989), cert. denied, 495 U.S. 923 (1990)	20
Whittaker Corp. v. Execvair Corp., 953 F.2d 510 (9th Cir. 1992) . .	12

TABLE OF AUTHORITIES - Continued

	Page
Whittemore v. Schlumberger Technology Corp., 976 F.2d 922 (5th Cir. 1992)	19
Williams v. Wright, 927 F.2d 1540 (11th Cir. 1991)	20

Statutes	Page
28 U.S.C. § 1254(1)	3
28 U.S.C. § 1331	9
29 U.S.C. § 186(c)(6)	3, 4
29 U.S.C. § 1002(1)	3, 4
29 U.S.C. § 1132	3, 4, 9

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**Petition For Writ Of Certiorari
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PETITION FOR WRIT OF CERTIORARI

Petitioner Dennis Delaye ("Petitioner") respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit filed on November 3, 1994.

OPINIONS BELOW

The Opinion of the Ninth Circuit Court of Appeals was filed on November 3, 1994, and its denial of a Petition for Rehearing and Suggestion for Rehearing En Banc was denied on December 28, 1994. The opinion and order denying the petition appear in the appendix. The Opinion is cited at 39 F.3d 235 (9th Cir. 1994). The Opinion of the Ninth Circuit reversed the April 1, 1993 Judgment of the District Court for the District of Oregon in Petitioner's favor, and the Judgment and Findings of Fact and Conclusions of Law dated February 8, 1993 appear in the Appendix.

JURISDICTION

The appellate judgment of the Ninth Circuit Court of Appeals was filed on November 3, 1994, following its denial of Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc on December 28, 1994.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner proceeded under 29 U.S.C. § 1002(1)(B), 29 U.S.C. § 186(c)(6), and 29 U.S.C. § 1132(a)(1)(B).

29 U.S.C. § 1002(1)(B) provides, in part:

> (1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such

> plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, *** (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

29 U.S.C. § 186(c)(6) provides, in part:

> The provisions of this section shall not be applicable ... (6) with respect to money or other thing of value paid for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs ....

29 U.S.C. § 1132(a)(1)(B) provides, in part:

> A civil action may be brought --
>
> (1) by a participant or beneficiary --
>
> (A) for the relief provided for in subsection (c) of this section, or

> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

STATEMENT OF THE CASE

Petitioner was first employed by Respondent, an agricultural cooperative, as its Vice-President of Marketing and Sales in September 1983. In 1988 he was made its Chief Operating Officer. Petitioner became its President in 1989.

In 1990 Petitioner signed an Employment Contract which provided if he were terminated without cause he would receive severance benefits, to include amounts payable over a period based upon his last two years' salary and bonus payments, plus continuing insurance coverage so long as he

remained uncovered by other insurance.[1] The employer, who was also the obligor, was to

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[1] 6.2.2 If Employee's employment is terminated pursuant to the terms of paragraphs 6.1.1, 6.1.2, or 6.1.3, or if Employer terminates Employee's employment pursuant to paragraph 6.1.7, Employee shall receive the following:

(a) Employer shall pay Employee payments as provided herein. The annual average of the base compensation and bonus paid by Employer to Employee pursuant to paragraphs 3.1 and 3.2 herein for the last two (2) full contract years prior to Employee's termination with Employer shall be divided by twelve (12). The resulting amount shall be paid to Employee by Employer on a monthly basis for a period of twelve (12) months plus one (1) month for each month of Employee's employment with Employer pursuant to this Employment Contract up to a maximum of twenty-four (24) months.

(b) Within thirty (30) days of the date of Employee's termination, Employer shall pay Employee all of Employee's accrued vacation.

(c) Employer shall continue to provide Employee with the same accident and health insurance, basic life insurance, additional life insurance, basic disability insurance, and additional disability insurance which was provided to Employee during the term of Employee's employment. Employer shall continue to provide these benefits until Employee finds other employment, or until the payments provided in subparagraph 6.2.2(a) terminate, whichever date first occurs.

make the determination whether he was terminated for cause.[2] If he were terminated

---

6.1 Reasons for Termination. Employee's employment with Employer shall terminate upon occurrence of any of the following events:

6.1.1 Mutual written agreement between Employer and Employee;

6.1.2 Employee's death;

6.1.3 Employee shall suffer a permanent disability. For purposes of this agreement, "permanent disability" shall be defined as Employee's inability due to physical or mental illness, or other cause, to perform the majority of Employee's usual duties for a period of six (6) months or more;

6.1.4 Employee's willful and continual failure and refusal to comply with the policies, standards, and regulations of Employer from time to time established or the terms of this agreement.

6.1.5 Fraud, dishonesty or any other act of misconduct in the performance of Employee's duties on behalf of Employer;

6.1.6 Sale, transfer or other disposition of all or substantially all the assets of Employer or the merger of Employer with another company;

6.1.7 Upon sixty (60) days prior written notice by either Employee or Employer to the other.

without cause he would receive according to the schedule over $350,000.00. If he were terminated for "willful and continual failure and refusal to comply with the policies, standards, and regulations of Employer form time to time established by the terms of the agreement" he would receive nothing.

Petitioner was given performance appraisals by the Board of Directors of Respondent in 1990 and again on August 6, 1991 in which he was rated as "generally competent." However, on November 6, 1991 he was terminated for willful misconduct. At no time prior to his discharge was he charged with wilful misconduct. Respondent refused payment of the contractual severance amount.

Petitioner brought suit in federal district court, and joined several federal and state claims in his complaint. At trial he dismissed all federal and state

claims except his collection of benefits claim under § 502 of ERISA, 29 U.S.C § 1132(a)(1)(B). The District Court had jurisdiction under 28 U.S.C. § 1331.

At trial Respondent argued that the Employment Contract was not an ERISA plan because a single employee cannot constitute a class under ERISA. It made no other argument that the provisions of the contract did not constitute a severance benefit plan for ERISA purposes. It did not argue that the contract did not constitute an ERISA severance benefit plan because it lacked an ongoing administrative program or scheme.

The District Court ruled in Petitioner's favor on the only issue raised by Respondent, and held that a single person can constitute an ERISA class of beneficiaries.

Respondent appealed and raised for the first time on appeal the issue whether the provisions of the contract had an ongoing

administrative scheme. The Ninth Circuit Court of Appeals reversed the District Court's opinion and ruled in favor of Respondent.

REASONS FOR GRANTING THE WRIT

Petitioner contends that if the Ninth Circuit is allowed to ignore its own precedent and allow Respondent to raise an issue for the first time on appeal an injustice will be imposed upon Petitioner and erroneous precedent will be established in the law of the scope of ERISA coverage.

1. This Case Presents An Exceptionally Important Question That Concerns The Essence Of Appellate Procedure.

a. The Dispositive Issue In The Ninth Circuit Was Raised For The First Time On Appeal.

Never at trial did Respondent ever suggest to the trial court that it believed that the Employment Contract did not constitute an ERISA severance plan because it lacked an ongoing administrative scheme.

The only issue raised by Respondent at trial as to whether the Employment Contract was an ERISA severance plan was whether a single employee could constitute a class of beneficiaries under ERISA. That was the only issue it briefed to the trial court. That was the only issue it argued to the trial court. That was the only issue Petitioner addressed in response. That was the only issue the Court was called upon to rule on by Respondent. That is the only issue that was ruled upon by the trial court. That issue was decided in Petitioner's favor. It was only during its appeal that Respondent raised the "ongoing administrative scheme" issue.

b. The Issue Argued In The Appellate Court By Respondent That The Contract Did Not Involve An "Ongoing Administrative Scheme" Was Not Raised Sufficiently For The Trial Court To Rule On It.

The Rule in the Ninth Circuit is that the appellate court will hear an argument

raised for the first time on appeal only if the argument was raised sufficiently for the trial court to rule on it. Whittaker Corp. v. Execvair Corp., 953 F.2d 510 (9th Cir. 1992); In Re E.R. Fegert, Inc., 887 F.2d 955, 957 (9th Cir. 1989). If this rule were applied here the Ninth Circuit never would have reached the dispositive issue because it is without question that it was not raised in the trial court.

The Ninth Circuit either ignored its own standard of appellate procedure or believed that when Respondent raised the generic issue that the contract did not constitute an ERISA plan for one specific reason the trial court was put on notice that it had to rule whether the contract was such a plan in the face of any objection Respondent could have but did not raise. This interpretation of its standard does violence to the standard itself, establishes unworkable precedent and has

deprived Petitioner of fundamental fairness in these proceedings.

In its Opinion the Ninth Circuit overstated Respondent's argument at trial. It stated that at trial Respondent "focused" on whether a one-person contract could be an ERISA plan. In fact, that was its only argument at trial. CR 19, CR 23. That is why that was the only issue addressed by the District Court in its Findings Of Fact And Conclusions Of Law. The District Court held that Petitioner's claim for severance pay under the Employment Contract was subject to ERISA, because a single employee could constitute a beneficiary class. See 30a to 33a.

The rule that an issue will not be heard for the first time on appeal unless it was raised sufficiently for the trial court to rule on it is a sound rule. Its purpose is to allow the trial court to consider and reconsider its rulings and

correct its errors. Morrow v. Greyhound Lines, Inc., 541 F.2d 713 (8th Cir. 1976). Trial courts are deprived of that opportunity if a party fails to raise an issue or call upon the court to rule on it.

A generic statement that, for example, a contract does not constitute an ERISA plan for one reason does not put before the court any unstated reasons that would be so. Therefore, it should be be expected that a court would only rule on reasons articulated to support a general proposition. Indeed, courts cannot be made to assume the burden of researching and ruling upon legal points not raised or briefed by the parties. The particular point raised by a party, and its submissions to the court on that issue, should circumscribe the trial court's obligation.

2. A Litigant Is Deprived Justice If The Appellate Court Allows An Issue To Be Raised For The First Time On Appeal.

In this case Petitioner briefed and responded to every argument raised by Respondent at trial, only to find that an issue not raised a trial and a case not cited by Respondent at trial, Fort Halifax Packing Co. v. Coyne, is the cause for reversal on appeal.

A party should at trial be called upon to meet only those objections that are raised by its opponent. That is the recognized standard. Yet the decision of the Ninth Circuit destabilizes the order that standard creates. It creates uncertainty in the course of trial practice. It suggests that a party must anticipate and try issues not raised. This works against the principle of economy in litigation. It encourages litigation of collateral and unnecessary issues. It works to proliferate the issues to be tried in a particular

case. It encourages appellate litigation because a party would not feel constrained by the trial record as being a complete account of the issues in controversy.

In this case Petitioner was denied justice because the Ninth Circuit failed to abide by its own precedent that it will not hear an issue for the first time on appeal unless the argument was raised sufficiently for the trial court to rule upon it. See State of Cal., Dept. of Health Services v. U.S. DHHS, 853 F.2d 634, 638 (9th Cir. 1988) (a Court of Appeals must ordinarily follow previous decisions of the court, absent subsequent change in substantive law); see also Singleton v. Wulff, 428 U.S. 121, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976) (explaining the purpose of the general rule against considering an issue not passed on below is the essential need to ensure the opportunity to offer evidence relevant to the issues and in order that

litigants not be surprised on appeal by decision of issues upon which there had been no opportunity to introduce evidence below). Instead, the trial court's decision was reversed for reasons it was never called upon to address. In the absence of plain misjustice it was error to consider the issue of sufficient administrative scheme for the proper resolution of the issue is not beyond doubt. Singleton, supra, 96 S.Ct. at 2877.

3. The Contract Provisions In Question Were Part Of The Inducement To Petitioner To Become And Remain President, And They Contained Sufficient Administration To Constitute An ERISA Plan.

a. Fort Halifax Is Not Controlling For This Did Not Involve The Mere Creation Of A Benefit.

In Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987), this Court held that plant closure legislation which merely required that severance benefits be extended and thereby merely created an

obligation to make a one-time payment of benefits was not an ERISA severance plan.

This case did not involve the legislative enactment of provisions which merely created a benefit. In this case Respondent was to:

(1) interpret facts and determine whether Petitioner was entitled to a benefit;

(2) interpret the language of the contract and determine what salary and bonus figures to apply (for bonus calculation purposes did "last two full contract years" mean the years the bonuses were paid, or the years for which the bonuses were earned?);

(3) disburse funds to Petitioner and, with respect to insurance carriers, to those providers; and

(4) administer the provisions calling for a termination of certain benefits upon reemployment.

Thus, in addition to the creation of the possibility of a severance benefit, here the employer was required to make an initial eligibility decision, interpret the benefit plan's provisions, distribute funds according to a formula and further administer the plan by monitoring the employee's work status.

b. Cases Stemming From Fort Halifax Are Distinguishable For This Plan Was Not A "Buyout Plan."

The benefit Petitioner bargained for was intended to be part of his overall economic security. It was a plan which, when it was established, was in contemplation of his continued employment. See e.g. Whittemore v. Schlumberger Technology Corp., 976 F.2d 922 (5th Cir. 1992). It was not a "buy-out" plan, or one which was offered to facilitate his removal or termination of employment. This distinguishes authority stemming from Fort Halifax,

supra, on this issue. E.g. Angst v. Mack Trucks, Inc., 969 F.2d 1530 (3rd Cir. 1992); Fontenot v. NL Industries, Inc., 953 F.2d 960 (5th Cir. 1992); and Wells v. General Motors Corp., 881 F.2d 166 (5th Cir. 1989), cert. denied, 495 U.S. 923 (1990). Therefore, the Ninth Circuit erred by relying on Fort Halifax, supra, and its progeny.

c. To The Extent An "Ongoing Administrative Scheme" Is Required To Constitute An ERISA Plan, The Required Showing Should Be Minimal.

To the extent an "ongoing administrative scheme" is required, that scheme should be minimal. See Moeller v. Bertrang, 801 F.Supp. 291, 294 (D.S.D. (1992) (the simplicity of the scheme does not defeat the existence of a plan); see also Williams v. Wright, 927 F.2d 1540, 1544-45 (11th Cir. 1991) (letter to one employee created plan subject to ERISA protection). After all, the subject is

severance benefits. When Congress stated it wanted to regulate severance benefits it did not distinguish between complex benefit plans and simple benefit plans, it simply included all plans included as part of an employment agreement. Plans offering severance benefits are typically formula driven yet simple to compute. Indeed, the provisions here are more complex than what one ordinarily would expect to encounter.

If the Ninth Circuit's Opinion is allowed to stand entire classes of employees who negotiate individual severance plans will be excluded from ERISA protection merely because their individual plan was not complex enough to require more than the following aspects of ongoing administration which are present as part of the severance package in question: an initial determination of eligibility; followed by an initial interpretation of the provision's language; followed by a formula driven set

of monthly payments, which continue for a period of time determined by a different formula; and which requires ongoing monitoring of the employee's work status because the benefits cease if the employee is reemployed during the benefit period. If such a severance plan does not require sufficient ongoing administration an entire class of plans has been wrongfully excluded from ERISA coverage.

CONCLUSION

Respondent should not be allowed to raise a different theory of a defense for the first time on appeal where it was not raised sufficiently for the trial court to rule on it.

Alternatively, if the issue of ongoing administration was properly addressed the

Ninth Circuit erred in ruling that this severance plan for an individual was not subject to ERISA protection.

Respectfully submitted,

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APPENDIX

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TABLE OF CONTENTS - APPENDIX

Page

Opinion of the United States Court of Appeals for the Ninth Circuit filed November 3, 1994 . . . . . 1a

Findings of Fact and Conclusions of Law in the United States District Court for the District of Oregon dated February 8, 1993 . . . . . 19a

Order of the United States Court of Appeals for the Ninth Circuit filed December 28, 1994 . . . . . 54a

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Dennis Delaye, Individually & on behalf of the Agripac, Inc./Dennis Delaye "Employment Contract",	)	No. 93-35257
Plaintiff-Appellee,	)	D.C. No. CV-92-00141-OMP
v.	)	
Agripac, Inc., an Oregon corporation,	)	
Defendant-Appellant.	)	
Dennis Delaye, Individually & on behalf of the Agripac, Inc./Dennis Delaye "Employment Contract",	)	No. 93-35398
Plaintiff-Appellee,	)	D.C. No. CV-92-00141-OMP
v.	)	
Agripac, Inc., an Oregon corporation,	)	
Defendant-Appellant.	)	
Dennis Delaye, Individually & on behalf of the Agripac, Inc./Dennis Delaye "Employment Contract",	)	No. 93-35578
Plaintiff-Appellee,	)	D.C. No. CV-92-00141-OMP
v.	)	
Agripac, Inc., an Oregon corporation,	)	OPINION
Defendant-Appellant.	)	

Appeals from the United States District
Court for the District Of Oregon
Owen M. Panner, District Judge, Presiding

Argued and Submitted
September 13, 1994--Portland, Oregon

Filed November 3, 1994

Before: Ruggero J. Aldisert,*
William A. Norris and David R. Thompson,
Circuit Judges.

Opinion by Judge Thompson

SUMMARY

**Labor and Employment/ERISA/
Termination and Suspension**

The court of appeals dismissed an appeal and remanded a case. The court held than an employment contract providing that an employee would receive payments upon termination did not constitute a "plan" within the meaning of the Employment Retirement and Income Security Act (ERISA).

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*Hon. Ruggero J. Aldisert, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

Appellee Dennis Delaye was appellant Agripac, Inc.'s president and chief executive officer. He and Agripac entered into a written "Employment Contract," which provided that if Agripac terminated Delaye for cause, he would receive only his base yearly compensation, prorated to the date of termination. The contract further provided that if Agripac terminated Delaye without cause, Agripac would pay him a fixed amount for 12 to 24 months according to a set formula. Additionally, if termination was without cause, Agripac would pay Delay accrued vacation benefits and provide him with certain insurance until he found other employment or Agripac ceased monthly payments to him according to the terms of the contract.

Agripac fired Delaye and treated his termination as a termination for cause. Agripac tendered Delaye nothing more than his yearly compensation prorated to the

date of termination. Delaye contended his termination was without cause, and sued Agripac in the district court, alleging a violation of the ERISA.

The district court found Delaye's termination was without cause. The court also found his employment contract was an ERISA plan, even though the contract applied only to Delaye and did not cover any other Agripac employee or class of employees. The court awarded Delaye severance benefits, but denied his request for attorney's fees. Agripac appealed, contending that Delaye's contract did not involve an ongoing administrative scheme, and therefore was not a "plan" under ERISA. Delaye cross-appealed from the denial of his request for attorney's fees.

[1] Agripac raised the issue whether Delaye's employment contract was an ERISA plan. Although the argument in the district court focused on whether a one-person

contract could be a "plan" under ERISA, this focus did not waive the issue Agripac raised.

[2] Provisions for severance pay may constitute an employee welfare benefit plan within the meaning of the ERISA. [3] However, Delaye's contract did not implicate an ongoing administrative scheme. While payment could continue for as along as two years under the contract, there was nothing discretionary about the timing, amount or form of the payment. Sending Delaye a check every month plus continuing to pay his insurance premiums for the time specified in the employment contract did not rise to the level of an ongoing administrative scheme.

[4] Because Delaye's employment contract was not a "plan" governed by the ERISA, his claim that his contract was

breached did not present a federal question. The district court lacked jurisdiction to resolve this dispute. Accordingly, the appeal and cross-appeal were dismissed, and the case was remanded to the district court with instructions to vacate the judgment and dismiss the action, without prejudice to Delaye bringing suit in state court.

COUNSEL

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Richard C. Busse and Scott N. Hunt, Law Offices of Richard C. Busse, Portland, Oregon, for the plaintiff-appellee-cross-appellant.

OPINION

THOMPSON, Circuit Judge:

Agripac, Inc. appeals the district court's judgment in favor of Dennis Delaye in his action brought under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461 (1985 & Supp. 1993). Delaye alleges Agripac violated ERISA by denying him severance benefits when he was fired. Delaye cross-appeals from the district court's denial of his request for attorney fees.

Delaye predicates federal court jurisdiction on his contention that the ERISA claim presents a federal question. 28 U.S.C § 1331; 29 U.S.C § 1332(e)(1). Because we conclude no ERISA plan existed, the district court lacked subject matter jurisdiction. Accordingly, we dismiss the appeal and cross-appeal, and remand to the district with instructions to vacate its judgment and dismiss the action.

FACTS

Delaye was Agripac's president and chief executive officer. In 1990, he and Agripac entered into a written "Employment Contract." Section 6 of the contract governs termination of employment. Paragraph 6.2.1 provides that if Agripac terminates Delaye for cause, he will receive only his base yearly compensation ($160,000), prorated to the date of termination. Paragraph 6.2.2 provides that if Agripac terminates Delaye without cause, Agripac will pay him a fixed monthly amount for twelve to twenty-four months according to a set formula. Additionally, if termination is without cause, Agripac will pay Delaye accrued vacation benefits and provide him with the same accident, health, life and disability insurance he had during the term of employment, until he finds other employment or Agripac ceased monthly payments to him according to the terms of the contract.

About a year after the contract was signed, Agripac fired Delaye. It treated his termination as a termination for cause and tendered him nothing more than his yearly compensation prorated to the date of termination. Delaye contended his termination was without cause, and sued Agripac in the district court, alleging a violation of ERISA and various pendent state law claims.

At trial, Delaye dismissed all of his claims except his claim under ERISA. The district court found Delaye's termination was without cause. It also found his employment contract was an ERISA plan, even though the contract applied only to Delaye and did not cover any other Agripac employee or class of employees. The court awarded Delaye severance benefits, but denied his request for attorney fees. This

appeal, and Delaye's cross-appeal, followed.[1]

Although Agripac contended in the district court that the employment contract was not an ERISA plan, its argument focused on whether an employment contract could be an ERISA plan when it covered only one person. The district court concluded that a one-person employment contract could constitute an ERISA plan. On that basis, it found the contract was an ERISA plan, without making findings, as to whether the contract otherwise qualified as an ERISA plan--that is, whether it involved an ongoing administrative scheme.

[1] In this appeal, Agripac argues Delaye's contract does not involve an

---

[1] Because we conclude Delaye's claim is not governed by ERISA, we do not reach his contention that the district court, having granted him judgment under ERISA, erred in denying his request for attorney fees.

ongoing administrative scheme, and therefore is not a "plan" under ERISA.[2] Delaye contends Agripac waived this argument because it did not present it to the district court. We disagree. Agripac raised the issue whether Delaye's employment contract was an ERISA plan. The argument in the district court focused on whether a one-person contract could be a "plan" under ERISA, but this focus did not waive the issue Agripac raised. Moreover, the facts necessary to resolve the issue are not in dispute. The record is sufficiently developed and the question may be decided as a matter of law. Therefore, we consider the issue. See Lawyers Title Ins. v. Honolulu Federal S&L, 900 F.2d 159, 164 (9th Cir. 1990).

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[2] Agripac also contends that a one-person employment contract cannot be an ERISA plan. We do not decide this question.

[2] ERISA, enacted by Congress in 1974, is designed to protect employees from losing their pensions and benefits due to employer mismanagement. Massachusetts v. Morash, 490 U.S. 107, 112 (1989). Provisions for severance pay may constitute an employee welfare benefit plan within the meaning of ERISA. See Scott v. Gulf Oil Corp., 754 F.2d 1499, 1503 (9th Cir. 1985). The question before us is whether the severance provisions that were part of Delaye's employment contract are an employment benefit plan under ERISA.

We are guided by the Supreme Court in Fort Halifax Packing Co. V. Coyne, 482 U.S. 1 (1987), which held that the severance package in that case was not an employee benefit plan within the meaning of ERISA and thus state law was not preempted. In stressing the difference between employee benefits and employee benefit **plans**, the Court recognized that the purpose of ERISA

preemption of state law is to create a single set of regulations to govern benefit plans' complex and ongoing administrative activities. Id. at 8-15.

From the fountain of Fort Halifax, and the stream of circuit court cases that have flowed from it, a relatively simple test has emerged to determine whether a plan is covered by ERISA: does the benefit package implicate an ongoing administrative scheme? See Fort Halifax, 482 U.S. at 12 ("The theoretical possibility of a one-time obligation in the future simply creates no need for an ongoing administrative program for processing claims and paying benefits."); Kulinski v. Medtronic Bio-Medicus, Inc., 21 F.3d 254, 257 (8th Cir. 1994) (holding the touchstone of determining existence of ERISA plan is "whether an administrative scheme is required"); James v. Fleet/Norstar Fin. Group, Inc., 992 F.2d 463, 466 (2d Cir. 1993) (same); Fontenot v. NL

Industries, Inc., 953 F.2d 960, 962 (5th Cir. 1992) (same); Angst v. Mack Trucks, Inc., 969 F.2d 1530, 1532 (3d Cir. 1992) (same). Our own circuit has employed this test. Bogue v. Ampex Corp., 976 F.2d 1319, 1323 (9th Cir. 1992) cert. denied, 113 S.Ct. 1847 (1993).

[3] Delaye's contract does not implicate an ongoing administrative scheme. Once Agripac decided to terminate Delaye, the severance calculation became one akin to that in Fort Halifax--a straightforward computation of a one-time obligation. The obligation was either to pay Delaye his regular salary prorated to the date of his termination, if he was terminated for cause; or pay him a fixed monthly amount for twelve to twenty-four months according to a set formula, plus accrued vacation pay and insurance benefits, if he was terminated without cause. While payment could continue for as long as two years, there is

nothing discretionary about the timing, amount or form of the payment. Sending Delaye, a single employee, a check every month plus continuing to pay his insurance premiums for the time specified in the employment contract does not rise to the level of an ongoing administrative scheme.

Relying on Bogue, Delaye argues the severance benefits provided in his contract meet the ongoing administrative scheme test. It is true that the severance package in Bogue is somewhat similar to the package in this case. See Bogue, 976 F.2d at 1323. Bogue is distinguishable, however, in two ways. First, the Bogue severance plan was triggered if the covered employee was not offered "substantially similar" employment. The Bogue court described this condition as requiring decision-making obligating the administrator to engage in "ongoing, particularized, administrative, discretionary analysis."

Id. Here, Delaye's rights to severance benefits are set by criteria in his contract. See James, 992 F.2d at 468 (simple arithmetical calculations and clerical determination do not require ongoing, particularized, administrative, discretionary analysis).

Second, Bogue's severance package covered ten top executives. Bogue, 976 F.2d at 1321. Crucial to the analysis in Bogue was the fact that the employer would need to make its discretionary determinations ten times, as it considered the severance benefits in each of the ten top executives' contracts. No such ongoing discretionary analysis is required in the present case.

Delaye urges us to view Bogue in light of the holding in Williams v. Wright, 927 F.2d 1540 (9th Cir. 1991). In Williams, the Eleventh Circuit held "that a plan covering a single employee, where all other

requirements are met, is covered by ERISA." Id. at 1545.

Williams is unhelpful to Delaye. Under Williams, a plan covering a single employee may be an ERISA plan "where all other requirements are met." Id. Here, even if an employment contract covering a single employee can be an ERISA plan, a question we do not decide, all other requirements are not met; the alleged "plan" does not implicate an ongoing administrative scheme.

[4] Because Delaye's employment contract is not a "plan" governed by ERISA, his claim that his contract was breached does not present a federal question. The district court lacked jurisdiction to resolve this dispute. Accordingly, we dismiss the appeal and cross-appeal, and remand to the district court with instructions to vacate the judgment and dismiss the action, without prejudice to Delaye

bringing suit in Oregon state court where a well-developed body of contract law, although perhaps not the ability to recover attorney fees, awaits him.

Appeal DISMISSED; cause REMANDED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

DENNIS DELAYE, Plaintiff,	)	CV No. 92-141-PA
v.	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
AGRIPAC, INC., an Oregon corporation, Defendant.	)	

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PANNER, J.

Plaintiff Dennis Delaye brings this action against Agripac, Inc., his former employer, alleging that defendant violated the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132, by failing to pay him $358,488.00 in severance

in accordance with a written employment contract.

These are my Findings of Fact and Conclusions of Law following the court trial. Fed. R. Civ. P. 52(a). I conclude that defendant has violated the provisions of ERISA by failing to pay plaintiff severance as required by the contract.

FINDINGS OF FACT

Defendant is a grower-owned agricultural cooperative with headquarters in Salem, Oregon. Plaintiff began working for defendant in 1983 as a vice president in the area of marketing and sales. He was promoted to senior vice president in 1987 and was further promoted to the position of chief operating officer in 1988. On July 1, 1989, defendant's Board of Directors (the Board) appointed plaintiff to replace Paul Solari as defendant's president and

chief executive officer. Plaintiff remained in that position until his discharge on November 6, 1991.

Plaintiff and defendant were parties to a written employment contract. Paragraph 6.1.7 of the contract gave defendant authority to terminate plaintiff's employment upon 60 days' written notice, so long as it granted plaintiff severance in accordance with a formula set forth at paragraph 6.2.2(a). Under paragraph 6.1.4, however, defendant had authority to discharge plaintiff without severance in the event of plaintiff's "willful and continual failure and refusal to comply with the policies, standards, and regulations of Employer from time to time established by the terms of this Agreement."

Plaintiff received satisfactory performance reviews from the Board during his first two years as defendant's president. He received a "generally competent" rating

on his August 29, 1990, performance evaluation, along with favorable recognition of his management skills and business judgment.[1] Plaintiff fared even better on his August 23, 1991, performance evaluation. Although his overall rating remained "generally competent," the evaluation stated that "Dennis' overall performance has improved over the past year." Plaintiff also earned praise for his industry knowledge and business acumen. The evaluation noted areas of weakness, such as Board relations, grower communications, cost reductions, and operations, but nevertheless concluded:

---

[1] "Generally competent" is defined as follows: "Employee performs most of the position objectives and requirements, but requires more than normal amount of direction and review of results. Employee may be new to a position, in a training assignment, or fall short of meeting some key objectives. Employee usually completes work within projected time or with reasonable efficiency, but use of time, methods, resources and/or level of proficiency require improvement."

"Dennis is a conscientious and dedicated employee striving to do his best for Agripac."

Notwithstanding the generally positive tone of plaintiff's August 1991 evaluation, the relationship between plaintiff and the board began to sour sometime before the summer of 1991. Most of the Board's criticism concerned plaintiff's performance in the following key areas: (1) plaintiff's alleged failure to prepare for important contract negotiations with the Birds Eye Company; (2) plaintiff's alleged failure to prepare a contingency plan, strategic plan and plant optimization study; (3) plaintiff's alleged failure to implement cost reduction measures; and (4) plaintiff's alleged failure to communicate effectively with the Board.

On August 6, 1991, Board Chairman Mike Calef sent a letter to plaintiff criticizing his relations with the Board and his management style. The letter stated:

> Everyone agrees that you are doing an excellent job in the marketing/sales and business portions of your responsibilities, but there is a serious concern in other areas, such as: board relations, communications and certain aspects of your management methods and styles. These issues have been building for some time and have caused a deterioration in the Boards' [sic] confidence .... The Board expects improvement, will work with you to achieve it, and will review progress with you after three months.

The letter also noted: "A serious concern was expressed regarding delays in carrying out Board objectives which you may not have agreed with ...."

On August 9, 1991, in response to the Board's criticisms, plaintiff sent the Board a "weekly update" of his business activities. The update focused on operations, sales/marketing, and other aspects

of defendant's business. Plaintiff prepared additional updates on August 16, August 23, September 4, and September 13. Plaintiff also met or held telephone conferences with the Board on August 30, September 6, and September 20 to discuss his strategies for the upcoming contract negotiations with Birds Eye.

Plaintiff's efforts to communicate with the Board and prepare for the Birds Eye talks were not sufficient to restore confidence in his leadership. At a closed meeting of the Board held on September 11, 1991, Board member Roger Hildebrandt urged that Paul Solari, plaintiff's predecessor, be appointed a co-leader in the Birds Eye negotiations. Hildebrandt also proposed that plaintiff be given until December 1, 1991, to improve his performance or face termination. Both motions were passed unanimously. The Board minutes state:

> ... Dennis' handling of the B.E. negotiations was unsatisfactory,

> and was a continuance of a pattern of not following Board requests in a timely fashion or delaying action until the last minute. The importance of the B.E. negotiations underscored the unacceptability of Dennis' method of operation and constituted, in the Board's view, neglect to follow the Board's directives and requests.
>
> ***
>
> The unanimous view of the Board was that Dennis should be terminated with a majority feeling that a termination date should be set by the Board. Only if a major improvement occurred in the performance of his duties would a continuance of employment be considered.

Chairman Calef advised plaintiff of the Board's decisions in letters dated September 16, 1991, and September 23, 1991.

Following the September 11, 1991, meeting, the Board took additional steps in preparation for plaintiff's termination. Paul Solari asked defendant's legal counsel to draft a proposed motion for the Board discharging plaintiff based on his "willful

and continual failure and refusal to comply" with defendant's policies. At a closed meeting on October 16, 1991, the Board discussed plaintiff's performance following Chairman Calef's letter of September 23. Calef stated that plaintiff had not responded to the Board's concerns and cited, as a primary example, plaintiff's failure to prepare a strategic plan for presentation at defendant's November 1991 planning conference. The Board voted unanimously to terminate plaintiff, but chose to delay the effective date until the end of October 1991.

On October 31, 1991, the Board held a closed meeting and agreed to give plaintiff the opportunity to resign with a severance package rather than face termination. The following day, Chairman Calef and Board members Solari and Hildebrandt met with plaintiff and advised him of the Board's

decision. The notes of that meeting contain a succinct explanation of the Board's action:

> ... lack of detailed preparation on the Birds Eye negotiations, delay on planning and implementing a cost reduction program, delay in submitting a contingency plan and plant consolidation plan, failure to prepare the new strategic plan, no agenda yet prepared for the November Planning Conference were all a part of a continuing and unacceptable pattern.

The Board members informed plaintiff that they would need a decision on his resignation no later than November 3, 1991. Plaintiff refused to resign and was terminated from his position effective November 6, 1991.

LEGAL ISSUES

Plaintiff brings this action under § 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), to recover severance pay under the employment contract. Plaintiff also seeks an award of attorney fees under § 502(g)(1)

of ERISA, 29 U.S.C. § 1132(g)(1). Defendant contends that the employment contract is not subject to ERISA. In the alternative, it maintains that plaintiff was discharged for his willful and continual refusal to comply with its directives and, therefore, no severance is owing.

This action presents four main issues:

> (1) Does the severance provision of the written employment contract between the parties constitute an employee benefit "plan, fund or program" under the coverage provisions of ERISA?
>
> (2) If ERISA applies, which party bears the burden of proof concerning plaintiff's entitlement to severance benefits?
>
> (3) Did defendant breach the employment contract when it discharged plaintiff without paying severance?
>
> (4) If defendant breached the employment contract, thereby violating ERISA, is plaintiff entitled to an award of attorney fees under ERISA?

My conclusions are set forth below.

I. ERISA coverage.

The ERISA statute contains detailed provisions regulating "employee welfare benefit plans" and "employee pension benefit plans." 29 U.S.C. § 1002(3). Employee welfare benefit plans under ERISA include plans established for the purpose of providing participants with "severance or similar benefits." 29 U.S.C. § 1002(1)(B); 29 U.S.C. § 186(c)(6). The coverage provisions of ERISA are set forth at 29 U.S.C. § 1003.

Defendant, although conceding that an employer's promise to pay severance is subject to ERISA, argues that a severance provision in an employment contract between an employer and a single employee is not covered by ERISA. In defendant's view, the provisions of ERISA extend only to benefit plans that cover a "class" of employees. Defendant relies on O'Hollaren v. Marine Cooks and Stewards Union, 83 Or. App. 133,

136-37 (1986), in which the Oregon Court of Appeals held that "[i]ndividual employment contracts are not 'plans' within the meaning or purpose of ERISA ...." Defendant also relies on U.S. Department of Labor opinion letters issued in 1976, a 1982 decision of the Eleventh Circuit, and federal cases from other jurisdictions.

Plaintiff maintains that a "class" for purposes of ERISA may be comprised of a single employee and, therefore, the employment contract in this case falls under ERISA. Plaintiff relies on Williams v. Wright, 927 F.2d 1540, 1545 (11th Cir. 1991), in which the Eleventh Circuit observed that "nothing in the ERISA legislation point[s] to the exclusion of plans covering only a single employee." The Williams court was also favorably impressed by a Department of Labor opinion letter dated October 22, 1989, which states that ERISA coverage is "not affected by the fact

that the arrangement is limited to covering a single employee, [or] is negotiated between the employer and the employee ...." Id. Notably, the Williams court expressly disagreed with the Oregon Court of Appeals's holding in O'Hollaren. Id. at 1546.

The parties have not cited, nor have I found, a Ninth Circuit case which defines the number of persons necessary to comprise a class under ERISA. Nevertheless, I am persuaded by plaintiff's interpretation of the statute. Plaintiff's position that a "class of one" is cognizable under ERISA is entirely consistent with the text of the applicable ERISA provisions and, in addition, appears to accord with the most recent opinion issued by the Department of Labor. Under the circumstances, I agree with the Eleventh Circuit's well-reasoned holding in Williams that, for purposes of ERISA, an employee benefit plan can be

negotiated between an employer and a lone employee. Plaintiff's claim for severance pay is therefore subject to ERISA.

II. Burden of proof.

Defendant maintains that this is a simple benefits case under 29 U.S.C. § 1132 (a)(1)(B) and, therefore, in accordance with the accepted practice in such cases, the burden of proof must remain with plaintiff at all times. See, e.g., Bueneman v. Central States, 432 F.Supp. 697 (E.D. Mo. 1977), aff'd, 572 F.2d 1208 (8th Cir. 1978). Plaintiff contends that this is not a usual case because defendant acted in the double capacity of employer and plan administrator. He argues that defendant should bear the burden of proving that the termination properly falls under Paragraph 6.1.4 of the employment contract.

In support of the proposed burden-shifting approach, plaintiff contends that paragraph 6.1.4 constitutes a forfeiture

clause which should be liberally construed in his favor and against defendant. See, e.g., Roth Development, Inc. v. A.R. John General Contractors, Inc., 263 Or. 561, 568 (1972). In the alternative, plaintiff contends that defendant is required to dispel an inference of inequitable decision-making arising from its dual role as employer and administrator of plaintiff's severance plan. I accept the second of plaintiff's arguments.

Plaintiff's conclusory assertion that Paragraph 6.1.4 constitutes a forfeiture clause rests on the untenable assumption that he has an absolute right to severance pay under the employment contract, and that a termination under paragraph 6.1.4 would operate to deprive him of his entitlement. Plaintiff's right to severance under the contract is neither absolute nor inviolate, but is entirely dependent on the circumstances surrounding the termination of his

employment. A discharge under Paragraph 6.1.4 of the contract carries with it no right to severance benefits. Paragraph 6.1.4 cannot be transformed into a forfeiture clause merely because termination under a different contract provision might have created an obligation to pay severance.

Plaintiff's alternative argument is more compelling. Plaintiff points out that this case is similar to ERISA cases that involve a conflict of interest or breach of fiduciary duty on the part of plan administrators. He observes that defendant made both the decision to discharge him and the decision to deny him severance benefits. He also notes that, because any severance owing to him would be paid out of defendant's coffers, defendant stands to a reap of considerable financial benefit from its decision to withhold severance pay. In light of defendant's dual role, plaintiff

concludes, defendant must prove that its interpretation of the employment contract was not tainted by self-interest.

Plaintiff's argument finds some support in Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989), in which the Supreme Court held that an ERISA claimant's challenge to a denial of benefits under 29 U.S.C. § 1132(a)(1)(B) must be reviewed under a de novo standard, rather than an abuse of discretion standard, unless the plan administrator is vested with discretionary authority to interpret the plan. In its discussion of the appropriate standard of review, the Court cautioned:

> ... if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a "facto[r] in determining whether there is an abuse of discretion."

Id. at 115 (quoting Restatement (Second) of Trusts § 187, Comment d (1959)). Plaintiff also relies on Brown v. Blue Cross & Blue

Shield of Alabama, 898 F.2d 1556 (11th Cir. 1990), cert. denied, 111 S.Ct. 712 (1991), and other Eleventh Circuit cases which apply a burden-shifting analysis. In Brown, the court held that the deferential standard of review ordinarily applied to the decisions of plan administrators requires modification where "an insurance company ... as ERISA fiduciary ... exercis[es] discretion over a situation for which it incurs 'direct, immediate expense as a result of benefit determinations favorable to [p]lan participants." Id. at 1561 (quoting De Nobel v. Vitro Corp., 885 F.2d 1180, 1191 (4th Cir. 1989)). The burden of proof in such a case must shift to the ERISA fiduciary, who must then demonstrate that the decision denying benefits was not influenced by impermissible motives. Id. at 1566.

I agree that defendant in this case filled a double role, acting both as plaintiff's employer and as the administrator of plaintiff's ERISA plan. Accordingly, I decline to accept defendant's contention that this case involves a run of the mill challenge to a denial of benefits. The Ninth Circuit has recognized "that if the employer is the [plan] administrator, a conflict ordinarily exists." Eley v. Boeing Co., 945 F.2d 276, 279 (9th Cir. 1991) (citations omitted). In light of Eley and the Supreme Court's dicta in Firestone, I cannot ignore the potential risks created when plan fiduciaries have a financial interest in the benefits decisions entrusted to them.

In addition, the Ninth Circuit has applied a burden-shifting approach in cases involving claims for breach of fiduciary duty. Tafoya v. Western Conference of Teamsters, 909 F.2d 344, 348 (9th Cir.

1990) (ERISA claimant bears initial burden to show that plan eligibility rules are unreasonable); Music v. Western Con. of Team. Pen. Trust Fund, 712 F.2d 413, 419 (9th Cir. 1983) (where plaintiff shows that plan eligibility requirements are unreasonable, "burden shifts to the trustees ... to come forward with evidence establishing ... reasonableness ...."). Although allegations of breach of fiduciary duty are not at issue in this action, it would be unwise to overlook the possibility that a conflict of interest impaired defendant's ability to administer the severance plan fairly. Under the circumstances, I conclude that the burden-shifting analysis proposed by plaintiff is the better approach. Accordingly, defendant must carry the burden of proof on the conflict of interest issue. It must be emphasized, however, that the ultimate burden of establishing an ERISA violation remains with the plaintiff.

Having determined the appropriate allocation of the burden of proof, I find that defendant has met its burden to show that its decision to withhold plaintiff's severance pay was not motivated by economic self-interest. I note that plaintiff does not assert a claim for breach of fiduciary duty, nor has he presented evidence that defendant's potential conflict of interest tainted its decision-making. Therefore, I am satisfied that defendant's decision to terminate plaintiff under Paragraph 6.1.4 was based on its assessment of plaintiff's job performance, rather than a desire for financial gain.

III. Plaintiff's termination does not fall under Paragraph 1.6.4.

Defendant has attempted to characterize plaintiff as a maverick executive, bent on pursuing his own private agenda while intentionally disregarding the Board's wishes. This portrayal of plaintiff cannot

be reconciled with the evidence. Although it is apparent that the Board had ample cause for dissatisfaction with plaintiff's performance in certain key areas, there is no convincing evidence that plaintiff intentionally disregarded the Board's directives or disobeyed its orders. Therefore, I cannot conclude that plaintiff demonstrated a "willful and continual failure and refusal to comply with the policies, standards, and regulations" established by defendant.

To begin with, I cannot credit defendant's assertion that "virtually from the beginning of his tenure, plaintiff embarked on a course of his own ... in frank, direct deviance from the policies ... of the Board ...." (Defendant's Supplemental Trial Memorandum, p. 6). Although defendant repeatedly makes the general allegation that plaintiff engaged in a "pattern" of insubordinate conduct, there is no specific

evidence that plaintiff willfully disregarded the Board's directives at any time during his first two years as defendant's president. To the contrary, plaintiff earned a "generally competent" rating in his annual performance evaluations for both 1990 and 1991. Neither evaluation contains any mention of insubordinate conduct and, in the August 23, 1991, appraisal, plaintiff was praised as "a conscientious and dedicated employee striving to do his best for Agripac ...." Both evaluations were formulated with the input and approval of the Board and there is no evidence that either one omits significant information nor that defendant handles its annual review process in a casual manner. Under the circumstances, it is fair to accept the evaluations at face value and to hold defendant to them.

Accordingly, in evaluating whether plaintiff's discharge falls under paragraph

6.1.4 of the employment contract, I am chiefly concerned with plaintiff's performance and conduct during the two-month period between the August 1991 performance evaluation and October 16, 1991, when the Board arrived at the termination decision. I conclude that, while plaintiff did not perform effectively during that period, defendant has failed to identify any specific orders or directives that he intentionally disobeyed.

A. The Birds Eye negotiations.

With respect to the Bird Eye contract, Board members were justifiably concerned that plaintiff had not taken the time to prepare adequate proposals and contingency plans. The criticism that plaintiff failed to share with the Board important information concerning the negotiations was also legitimate. Nevertheless, the evidence

does not establish that plaintiff "willfully and continually" disregarded Board directives pertaining to the talks.

According to the case summary prepared by Paul Solari, regarded by defendant as the definitive statement of its position in the case, plaintiff was making progress in his preparations for the Birds Eye talks, but lacked a cohesive plan. To remedy this problem, the Board brought in Solari as co-leader of the negotiating team. Solari testified that he and plaintiff made every effort to get along with each other during negotiations. The evidence therefore indicates that, at least to the Birds Eye contract, plaintiff attempted to cooperate with the Board and Solari. That conclusion is further supported by the fact that plaintiff met with the Board several times in August and September 1991 to discuss the Birds Eye contract, yet defendant has produced no minutes or meeting notes which

mention any failure by plaintiff to comply with the specific Board directives.

B. The contingency plan, strategic plan, and plant optimization study.

As part of his responsibilities for the 1991-1992 fiscal year, plaintiff was expected to prepare (1) a contingency plan in the event the Birds Eye contract was not renewed, (2) a strategic plan to ensure continued profitability for the company, and (3) a plant consolidation plan exploring the possible closure of defendant's Plant #2. The plans were scheduled to be presented to the Board at the planning conference in late November 1991.

Both parties have presented documents and testimony in an attempt to establish the amount of work plaintiff had completed on the plans at the time of his discharge. Defendant maintains that plaintiff had not made any meaningful progress and would not have been prepared for his presentation at

the planning conference. Plaintiff asserts that the work was progressing well. Based on the evidence, it is probable that plaintiff could have made a presentation at the planning conference, but that his work would not have met the Board's expectations. Nevertheless, I cannot conclude that plaintiff willfully disregarded the Board's wishes merely because his work was unsatisfactory or was progressing too slowly. Furthermore, given that the termination decision was made more than one month before the plans were scheduled for presentation, it would be unfair to regard plaintiff's failure to complete the assignment as an act of defiance against the Board. Plaintiff's delay in preparing for the November planning conference arguably reflects on his level of competency, experience, and motivation, but it does not establish a basis for termination under paragraph 6.1.4 of the employment contract.

C. Cost reduction.

Plaintiff was also criticized for his failure to develop a satisfactory cost reduction program. Board members testified that plaintiff repeatedly proposed measures designed to contain costs, but made no attempt at cost reduction.

Based on the evidence, it appears that plaintiff and the Board approached the matter of cutting costs from different perspectives. As stated in the Solari case summary, "[i]t was apparent that [plaintiff's] 'vision' was to grow the company and therefore cost reductions were not necessary." Notwithstanding this difference in philosophy, however, Solari acknowledged that plaintiff had discussed cost reduction with him after receiving Mike Calef's August 6, 1991, warning letter. Solari also testified that he was pleased to see that plaintiff was taking

action. In addition, Bob Isaacs, defendant's vice president in charge of operations, and George Crispin, vice president of business development, testified that they were involved in various cost saving measures during the time plaintiff was president.

Under the circumstances, I find that plaintiff made an effort to achieve cost reductions, but that he failed to produce the positive results sought by the Board. As with the other criticisms directed at plaintiff, the Board's concerns about cost reduction relate to the issue of plaintiff's job performance. There is no evidence that plaintiff was insubordinate.

D. Communications with the Board.

Plaintiff also received considerable criticism for his failure to communicate effectively with the Board. However, as with the Board's other concerns, the matter of "Board relations" relates to plaintiff's

job performance. After Plaintiff received the August 6, 1991, warning letter, he provided the Board with several written updates and participated in meetings and telephone conferences where the Birds Eye contract was discussed. I must therefore concluded that, although plaintiff's efforts to improve his communication skills did not receive the Board's approval, there is no evidence that he wilfully ignored the Board's wishes on the subject.

E. Interpretation of the employment contract.

In analyzing the evidence, I have borne in mind defendant's argument that the language of paragraph 6.1.4 should be construed in light of the business relationship between the parties. The argument is well taken. The success of the relationship between a company's president and its directors may often depend on complimentary management styles and a common

sense of purpose. Nevertheless, I remind defendant that, under the employment agreement, plaintiff has a right to severance pay in the event of a termination not occasioned by his intentional, persistent refusal to comply with Board directives. When defendant contracted with plaintiff, it knowingly assumed the risk that poor performance, personality conflicts or clashing management styles might require plaintiff's termination along with payment of a severance package. Defendant must abide by the contract as it stands.

Defendant has not established grounds for termination under paragraph 6.1.4 of the employment contract. Plaintiff therefore has a right to recover severance benefits under § 502 of ERISA, 29 U.S.C. § 1132(a)(1)(B).

IV. Plaintiff is not entitled to an award of attorney fees.

Under 28 U.S.C. § 1132(g)(1), the court has discretion to award reasonable attorney fees to the prevailing party. The propriety of such an award depends on the following factors:

> (1) The culpability or good faith of the opposing party;
> (2) the ability of the opposing party to pay the fee award;
>
> (3) the degree of deterrence which would result from an award of fees;
>
> (4) whether the parties requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or resolve a significant ERISA legal question;
>
> (5) the relative merits of the parties' positions.

Dytrt v. Mountain State Tel. and Tel. Co., 921 F.2d 889 (9th Cir. 1990) (citing Hummell v. S.E. Rykoff & Co., 634 F.2d 446, 453 (9th Cir. 1980)).

Based on the factors enumerate above, I find that this is not an appropriate case for an award of prevailing party attorney fees. Although factor two arguably cuts in favor of an award, the remaining factors cut against it. Defendant's position in this case was apparently adopted in good faith, and its legal arguments were not without merit. In addition, given the unique circumstances surrounding plaintiff's discharge, an award of fees would have no deterrence value. Finally, plaintiff's claim was not intended to benefit a class of beneficiaries, nor has it addressed a significant legal question under ERISA. Accordingly, plaintiff's fee request is denied.

CONCLUSION

Defendant has violated the provisions of ERISA by failing to pay plaintiff severance as required by the employment contract. Plaintiff is entitled to an

award of severance. Plaintiff's request for attorney fees is denied.

DATED this 8 day of Feb, 1993.

/s/ Owen M. Panner
Owen M. Panner
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Dennis Delaye, Individually & on behalf of the Agripac, Inc./Dennis Delaye "Employment Contract",	No. 93-35257
Plaintiff-Appellee,	D.C. No. CV-92-00141-OMP
v.	
Agripac, Inc., an Oregon corporation,	
Defendant-Appellant.	
Dennis Delaye, Individually & on behalf of the Agripac, Inc./Dennis Delaye "Employment Contract",	No. 93-35398
Plaintiff-Appellee,	D.C. No. CV-92-00141-OMP
v.	
Agripac, Inc., an Oregon corporation,	
Defendant-Appellant.	
Dennis Delaye, Individually & on behalf of the Agripac, Inc./Dennis Delaye "Employment Contract",	No. 93-35578
Plaintiff-Appellee,	D.C. No. CV-92-00141-OMP
v.	
Agripac, Inc., an Oregon corporation,	ORDER
Defendant-Appellant.	

Before: ALDISERT,* NORRIS and THOMPSON, Circuit Judges

The panel has voted unanimously to deny the petition for rehearing. Judge Thompson has voted to reject the suggestion for rehearing en banc, and Judges Aldisert and Norris so recommend.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* Hon. Ruggero J. Aldisert, Senior United States Circuit Judge for the Third Circuit, sitting by designation.